IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 283

WARD LANE, as Warden of the Indiana State Prison,
Petitioner,

vs.

UNITED STATES OF AMERICA EX REL.,
GEORGE ROBERT BROWN,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The rules of the Supreme Court of Indiana, in part, are necessary to an understanding. Under this heading there is set forth portions of Rule 2-6 and Rule 2-40 of the Indiana Supreme Court as taken from that Court's opinion in *McCary* v. *State of Indiana*, ... Ind. ....., 173 N. E. (2d) 300, at p. 307:

Rule 2-6 of this court, 1958 Edition, provides, in relevant part:

"There shall be attached to the front of the tran-

script, immediately following the index, a specific assignment of the errors relied upon by the appellant in which each specification of error shall be complete and separately numbered."

Rule 2-40 of this court, 1958 Edition, provides, in relevant part:

> "An appeal may be taken to the Supreme Court from a judgment granting or denying a petition for a writ of error coram nobis. The sufficiency of the pleadings and of the evidence to entitle the petitioner to a vacation of the judgment will be considered upon an assignment of error that the finding is contrary to law. The transcript of so much of the record as is necessary to present all questions raised by appellant's propositions shall be filed with the clerk of the Supreme Court within ninety (90) days after the date of the decision. The provisions of the rules of this court applicable to appeals from final judgments shall govern as to the form and time of filing briefs."

QUESTION PRESENTED.

Whether Indiana denied Respondent, an indigent convicted prisoner, the equal protection of its laws as required by the Fourteenth Amendment to the United States Constitution by a procedure for appeal from denial of a post-convictional remedy (Writ of Error Coram Nobis) under which:

(a) Any non-indigent convicted prisoner may appeal to the Supreme Court of Indiana as a matter of right by purchasing and filing a transcript, and

(b) Respondent could not have such appeal because the Public Defender refused to represent him or furnish the transcript which Respondent could not afford.

SUMMARY STATEMENT OF CASE.

Introduction to Summary Statement.

The facts of this case include both the events in which Respondent was directly involved and the state of the law, that is, the processes governing appeals in Indiana. Expository statements about the laws of Indiana concerning appeals are, in a real sense, a part of the "facts" in this action. In order to have the facts brought together in a single statement, we have chosen to include our own presentation under the heading STATEMENT. We also believe that a full and careful statement may be found in the opinion of the Court of Appeals below (R. 76-80).

A. What Happened to George Robert Brown?

George Robert Brown, Respondent, was convicted and condemned to death (R. 11). Upon appeal, the decision in the trial court was confirmed (R. 11). A petition for a Writ of Certiorari to the Supreme Court of the United States was denied (R. 11). Thereafter, a petition for a Writ of Error Coram Nobis in the trial court was denied (R. 13). The Public Defender of the State of Indiana refused to assist the Respondent in an appeal from such denial (R. 13). A petition for the appointment of counsel and the providing of a transcript was denied in the trial court (R. 13). A petition for Writ of Mandate in the Supreme Court of Indiana to direct the trial court to provide counsel and transcript was denied (R. 13). Certiorari was sought in the Supreme Court of the United States and denied (R. 14). A petition for a Writ of Habeas Corpus was filed in the Federal District Court for the Northern District of Indiana (R. 14). The Court below ordered that the State of Indiana be given ninety days (or such longer time as it might upon application estab-

lish as necessary) to provide the Respondent with the appeal, up to that time, denied to him (R. 65). After the ninety days had passed, at Respondent's request, the District Court required the State to report what action it had taken (R. 65-6). The State reported to the District Court below that an affidavit had been filed by one of its Deputy Attorneys General with the Supreme Court of Indiana under the number and in the cause in which Respondent had filed for a Writ of Mandate informing that Court of the existence of the Habeas Corpus proceedings and the order of the District Court, to which affidavit a copy of the District Court's order was attached. The response further stated that, except for such filing, no action had been taken by the State of Indiana (R. 67). The Court of Appeals affirmed the decision below and the State filed its petition for Certiorari in this Court.

B. What Is the State, the Condition of Relevant Law of Indiana?

Indiana's Public Defender Statute (P. Br. 2-4).

"Petitioner concedes that if Respondent has sufficient funds he could buy a transcript of the hearing in his Coram Nobis Writ in the Lake County Criminal Court. If he could not secure counsel, he could at least appeal *pro se*" (P. Br. 13).

The Public Defender is not "authorized to order a transcript at public expense for prisoners whom he does not represent." (*Willoughby* v. *State* (1961), ... Ind. ..... : 177 N. E. (2d) 465, at 470.)

"Decisions of the Indiana Supreme Court have made it clear that where an indigent desires to take an appeal from an adverse decision in a post-conviction remedy, such as coram nobis, he must first obtain the assistance of the Public Defender" (P. Br. 11).

With respect to a post-conviction remedy, the right of appeal may be accorded by the State upon such terms as it may determine proper. (*McCrary* v. *State* (1961), Ind. ; 173 N. E. 2d 300, at 304, 305.) Coram Nobis is a post-convictional remedy, civil in nature, and the indigent prisoner cannot as a matter of right have a transcript furnished him at public expense (*McCrary* v. *State* (1961), Ind. ; 173 N. E. (2d) 300, at 305).

"A prisoner may represent himself, but if he does so he is bound by all of the rules of procedure in this jurisdiction" including furnishing of a Bill of Exceptions and a transcript. (*McCrary* v. *State* (1961), Ind. ; 173 N. E. (2d) 300, at 306, 307).

The failure to furnish a specific assignment of errors and a transcript, as required respectively, by Rules 2-6 and 2-40 of the Supreme Court of Indiana is jurisdictional, and the Court, in their absence, "is without jurisdiction to determine the questions which he has attempted to raise" (*McCrary* v. *State* (1961), Ind. ; 173 N. E. 2d 300, at 307).

SUMMARY OF ARGUMENT.

Our argument consists of an effort to summarize the State's argument and to answer its important elements. During the course of this portion of the argument we will seek to develop that the Respondent's case is not, in any substantial way, distinguishable from the leading cases in the field and that Indiana's procedure as depicted in the State's brief does not fulfill constitutional requirements. In a second section of argument we shall seek to present affirmatively a case for the Respondent in which we will point out not only what was denied to Respondent and the opportunities that Indiana had to furnish Respondent with a full appellate review, but seek as well

to develop the weaknesses which appear in *Willoughby* v. *State of Indiana* (1961), ... Ind. ....., 177 N. E. (2d) 465. As we have indicated already, it would appear that the *Willoughby* case attempts to add to the indigent prisoner's right to seek the help of the Public Defender, some sort of check on the work of the Public Defender in cases in which he refuses this assistance.*

Basically, the State's case fails because the State's system of appeals has failed to grant the equal protection which the Fourteenth Amendment to the Constitution requires. The State's brief attempts to equate the view of the Public Defender as to the merit or frivolity of an indigent's case with the opinion and judgment of the highest court in Indiana on the non-indigent's case. The highest court in Indiana has sought to establish that it maintains some form of supervision over the Public Defender and that it will in a proper case (without ever defining what is a proper case) look into the Public Defender's exercise of discretion. This, however, is done without offering the indigent prisoner any opportunity to have the record of his case before the court, and is a procedure wholly different and not in any sense the equivalent of the full appellate review which the non-indigent prisoner has as a matter of right.

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* But compare *Macon* v. *Orange Circuit Court* (1962), ... Ind ....., 185 N. E. (2d) 619.

ARGUMENT.

INTRODUCTION TO ARGUMENT.

It is difficult to come to grips with the State's argument because it is curiously elusive. The State uses all the right words and mentions all the right cases, but does not meet the constitutional problem squarely. This view has dictated the form of our argument. We shall endeavor to answer the various parts of the State's argument in the sequence in which these parts are presented, with one exception, whether they deal with statements of fact, statements of principle, premises, or argumentative material. We will then set out a brief for the Respondent.

After many hours of seeking to determine in what way the State's argument is elusive and difficult to deal with in an organized fashion, a view of that argument which we believe to be correct is possible to state. It is our submission that *Willoughby* v. *State* (1961), Ind. ; 177 N. E. (2d) 465, represents, in effect, an admission by the Supreme Court of Indiana that the mere presence of a Public Defender, and his consideration and decision as to whether an indigent prisoner shall have an appeal, is not constitutionally tenable. *Willoughby* v. *State* (1961), Ind. ; 177 N. E. (2d) 465, adds something to the process which Indiana provides, but this is not presented or argued or adopted by the Attorney General. The State's Brief goes no further than to indicate, by suggestion and implication in the material on page 21, that this is an available part of the Indiana procedure. The Attorney General does not, at any point, attempt to argue that this adds anything to Indiana's process from a constitutional point of view.

A. ANSWER TO STATE'S "ARGUMENT."

1. Summary of State's Argument.

It is submitted that the following is a fair summary of the State's argument:

(1) Indiana's classification of indigents and non-indigents for purposes of appeal, is permissible if founded on reason, and

(2) The classification is imbued with reasonableness since it is designed to protect Appellate Courts from becoming overburdened with frivolous appeals at public expense and to protect public officials from harassment.

(3) The opinion of the Public Defender, as to a meritorious cause, is an adequate substitute for an appeal to the Supreme Court of Indiana and does not deprive an indigent of fundamental fairness.

(4) Such review as is provided by the Supreme Court of Indiana of the Public Defender's decision shows that the Public Defender works under the watchful eye and acts as an arm of the highest court in Indiana, but the State does not make the argument stated as a conclusion in *Willoughby* v. *State of Indiana* (1961), Ind. , 177 N.E. (2d) 465, at 472.

2. How the State Has Argued.

It is submitted that the State has:

(a) Unduly restricted the significance of *Griffin* v. *Illinois* (1956), 351 U. S. 12; *Burns* v. *Ohio* (1959), 360 U. S. 252; *Smith* v. *Bennett* (1961), 365 U. S. 708.

(b) Distinguished *Eskridge* v. *Washington State*

Board of Prison Terms and Paroles (1958), 357 U.S. 214, by an unsound argument.

(c) Relied upon an unwarranted assumption that lack of merit in Respondent's case should be presumed.

(d) Introduced *Coppedge* v. *United States* (1962), U.S. , 82 S. Ct. 917, for what it does not mean.

(e) Attributed unspecified weight to what is alleged to be a part of the Indiana appeals process, a part which admittedly was withheld from Respondent, which comes into operation by unspecified means at unspecified times and which, when used, is ineffective to render valid that which preceded it.

3. The State's Argument Considered.

(a) Griffin,[1] Burns,[2] and Smith v. Bennett.[3]

The State disposes of *Griffin*, *Burns*, and *Smith* in short order. It says that they deal with indigency solely and not with a method of sifting out non-meritorious appeals of indigents.

A distinction which is not based on real substance and meaning cannot hold off the force and pressure of these authorities. These cases do not treat of minor statutory technicalities, but with an important constitutional clause. They are not routine cases dealing with problems arising out of the passing trivia of a changing and developing society.

These cases, when combined with *Eskridge* v. *Washington State Board of Prison Terms and Paroles* (1958), 357 U.S. 214, apply a constitutional measuring stick to the

1. *Griffin* v. *Illinois* (1956), 351 U. S. 12.
2. *Burns* v. *Ohio* (1959), 360 U. S. 252.
3. *Smith* v. *Bennett* (1961), 365 U. S. 708.

treatment of appeals of indigent prisoners in a test of one aspect of our progress toward fulfilling the goal of Equal Justice Under Law.

Significance of this caliber has been attached to these cases, as one has succeeded the other in decision, by this Court itself. These cases call upon the several States to re-examine their established procedures and to change them, as change is required, in order to give to individual members of our society some larger part of that which the great promises of our Constitution lend hope can be achieved.

An interesting legal tactic can distinguish the cases. But such a device will not turn them awry nor will their potent language lose the name of action in this cause.

Griffin v. *Illinois* (1956), 351 U.S. 12, enunciated the primary guide-lines for situations of this sort. This is demonstrated by two excerpts. At page 18:

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. * * * But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discrimination." (Citations omitted).

and at page 19:

> "There can be no equal justice where the kind of trial

> a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

Invidious discrimination dies hard. Distinctions without substance were immediately seen and urged and, with equal speed, dispatched. In *Burns* v. *Ohio* (1959), 360 U.S. 252, the facts are different. They can be distinguished from *Griffin* v. *Illinois* (1956), 351 U.S. 12, and Ohio argued the distinctions. *Griffin*, it was argued, was a first appeal; *Burns*, a second appeal, the first having been provided.

The Court speaking of this distinction says at page 257:

> "This is a distinction without a difference for, as Griffin holds, once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty • • • . This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellant procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency" (Citations omitted).

A second distinction was urged. In *Griffin* v. *Illinois* (1956), 351 U.S. 12, the appeal was a matter of right; in *Burns* v. *Ohio*, (1959), 360 U.S. 252, a matter of discretion. To this the Court said at pages 257-258:

> "Since Griffin proceeded upon the assumption that review in the Illinois Supreme Court was a matter of right, • • • Ohio seeks to distinguish Griffin on the further ground that leave to appeal to the Supreme Court of Ohio is a matter of discretion. But this argument misses the crucial significance of Griffin. In Ohio, a defendant who is not indigent may have the Supreme Court consider on the merits his application for leave to appeal from a felony conviction. But as that court has interpreted § 1512 and its rules of practice, an indigent defendant is denied that opportunity. There is

> no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants. Indigents must, therefore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio."

and added at page 259:

> "• • • • Here, the action of the State has completely barred the petitioner from obtaining any review at all in the Supreme Court of Ohio. The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."

In *Smith* v. *Bennett* (1961), 365 U.S. 708, invidious discrimination was rooted out in the face of distinctions urged, but rejected by this Court, as is partially recognized by the State (P. Br. 17). It was in this opinion that the following language was used:

> "The gist of these cases is that because '(t)here is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants,' *Burns* v. *State of Ohio*, *supra*, 360 U.S. at pages 257-258, 79 S. Ct. at page 1168, '(t)here can be no equal justice where the kind of trial a man gets depends on the amount of money he has,' *Griffin* v. *People of State of Illinois*, *supra*, 351 U.S. at page 19, 76 S. Ct. at page 591, and consequently that '(t)he imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law.' *Burns* v. *State of Ohio*, *supra*, 360 U.S. at page 258, 79 S. Ct. at page 1169."

The State has seen the narrow and separate significance of each of these cases, but has failed to catch their gist.

They do not merely represent a decision on a single set of facts, but are the expression of a standard of constitutional requirement. Whatever Indiana or any other State

does with respect to appeals by indigent prisoners succeeds if it meets the standard, fails if it does not.

We are now at the single exception to answering the State's brief in its exact order. On page 14 of Petitioner's brief there is set out language taken from the concurring opinion of Mr. Justice Frankfurter in the *Griffin* case (p. 24). This language has been widely quoted, and it is of some interest to notice that a similar thought is expressed in the last paragraph of the principal opinion in that case at page 20, in *Burns*, at page 258, and in *Eskridge* v. *Washington*, at page 216. The words of Justice Frankfurter are quoted as supporting the Indiana process. To make this use of the language is to do violence to the words of this quotation and to the other suggestions of the Court referred to above. The State uses the language almost as though the words of Justice Frankfurter can be employed in the following manner: classification is permissible and Indiana has classified indigents and non-indigents, for the reason that it does not wish its appellate courts overburdened. Q.E.D.

This is not what Justice Frankfurter says and is not what he implies. He says that " * * * modes for securing a review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process" *(p. 24). If this language is taken to mean that the various States are free to develop systems governing indigent appeals which fulfill the requirements of the standard of the *Griffin* case, then the language takes on significance. The standard of the *Griffin* case requires that the mode employed does not "bolt the door to equal justice" or, as it is expressed in *Eskridge*, the mode must provide "an adequate substitute for the right to full appellate review". Other language in Justice Frankfurter's concurring opin-

* *Griffin* v. *Illinois* (1956), 351 U. S. 12, 76 S. Ct. 585 (p. 24).

ion, makes it perfectly evident that it was not his view that a process which did not meet the standard would be constitutional. At page 24, Justice Frankfurter said:

> "The State is not free to produce such a squalid discrimination. If it has a general policy of allowing general appeals it cannot make lack of means an effective bar to the exercise of this opportunity. The State cannot keep the word of promise to the ear of those illegally convicted and break it to their hope."

In this case the Petitioner is bound to show that the Indiana system, based upon classification, nevertheless, meets the constitutional standard. In this, we submit, the State has failed.

(b) Eskridge v. Washington State Board of Prison Terms and Paroles.

Eskridge v. Washington State Board of Prison Terms and Paroles (1958), 357 U. S. 214, was more troublesome to the State, which hit upon an unsound argument as a basis of distinction. The State says that to give a trial judge the burden of deciding upon the merits of an appeal works an unfairness on an indigent because the trial judge would view possible reversal with distaste. On the other hand, the State contends that the Public Defender, having represented the indigent prisoner in the lower court, would have a vested interest in seeing that his loss of the case was corrected. This is an odds-maker's argument. Is it not, considering the same persons, equally sensible, to argue that a trial judge finding that his decision is challenged would welcome the opportunity to permit an appeal, so his judgment could be affirmed? Is it not possible, also, that a Public Defender, having lost the case in the lower court would, fearful of exposure of his lack of capacity and ability, seek to permit the case which he lost to be buried rather than be reversed?

Neither the approach suggested by the State, nor the alternate which we have suggested, is sound or worthy of consideration. Both are based on guesses as to what might motivate this individual or that. Neither is an approach that furnishes a proper basis for fixing a constitutional standard.

Moreover, the State's argument reveals its own fatal weakness. It indicates that neither trial judge nor Public Defender, brings to this kind of task the objective attitude which must be present in anything denominated an appeal or "an adequate substitute" therefor.

A process which remains within the judicial system and relies upon the trial judge is found lacking in *Eskridge*. The Public Defender is neither a judge nor a judicial officer. He performs a ministerial function with effects upon individuals who have rights that can be tested only within the judiciary. It seems highly unlikely that a heavy responsibility, judicial in nature, should be entrusted to someone outside the judicial system in the case of the indigent, as long as appeals of the non-indigent are measured within the judicial system.

The essence of *Eskridge* is missed by the State. The Court says at page 216:

> "In *Griffin* v. *People of State of Illinois*, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891, we held that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials. We hold that Washington has denied this constitutional right here. The conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript."

The key words are "an adequate substitute for the right of full appellate review." We submit that a Public Defender's conclusion is not an adequate substitute, particularly since a trial judge's conclusion has already been ruled out. The State's language in this regard is of some interest. Although later in the brief the State speaks more strongly, at this critical point in its argument, it does not claim, even verbally, that the Public Defender's opinion is "an adequate substitute for a full appellate review," but couches its clinching sentence in words that claim only that it "comes closer to a reasonable substitute for an appellate review than does that of the trial judge" (P. Br. 17).

(c) Presuming Lack of Merit.

Beginning at the middle of page 18, the State's brief proposes that the Courts below should not have presumed error in the decision of the Public Defender, or of the trial court upon denial of Respondent's Writ of Coram Nobis. The State proposes instead that there be substituted a presumption of no error. It would seem that the State thus achieves, in its brief, the very conclusion that Respondent believes is a matter for determination by the Supreme Court of Indiana. If this argument of the State were accepted, the State would have achieved a *tour de force*, indeed! This would be a very easy way to settle all questions in this field. With respect to indigents, we would presume that there was no error in the decision which denied them an appeal. If this is appropriate, we would then make the same presumption for the non-indigents. If this were appropriate, we could broaden our bases of operation and include not only indigent and non-indigent prisoners and criminal matters, but civil matters as well. We would, thus, solve the problem of overburdening our Appellate Courts, for by this single presumption we would have demonstrated that there is no need for them at all.

The argument must be wholly disregarded. We cite briefly from *Griffin* v. *Illinois* (1956), 351 U. S. 12, at page 16:

> "We must, therefore, assume for purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioners could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript."

(d) Coppedge v. U. S.

When *Coppedge* v. *U. S.* (1962), ... U. S. ..., 82 S. Ct. 917, appeared in the advance sheets, Respondent's counsel expressed some chagrin that the case had not been available for use in the brief or argument of the instant case at the time it was docketed in the Court of Appeals for the Seventh Circuit. It was, then, a matter of amazement that the State, as appears from its brief, pages 19 and 20, not only gathered comfort from this case, but feels that it lends authoritative support to the State's position.

The conclusion which the State has expressed with respect to the *Coppedge* case is not what that case stands for, and the reasoning applied by the State will not stand critical scrutiny.

The question concerning indigents' appealing and the help that must be given to indigents in the terms of the *Coppedge* case are entirely different than what is required by the processes established in Indiana.

An indigent's application reached the Court of Appeals along with the certificate of a District Judge that says the applicant lacks "good faith." This Court then examined the situation and determined what must be done.

1. It recognized that the materials before the Court of Appeals at this stage, are generally inadequate for passing upon the application (p. 921).

2. If, despite the inadequacy of the materials, they reveal on their face, an issue for review which is not clearly frivolous, then leave to proceed as a pauper should be granted, counsel appointed and the Court of Appeals should "proceed to consideration of the appeal on the merits in the same manner that it considers paid appeals" (p. 921).

3. If, because of the inadequacy of the materials, the Court of Appeals can not determine the substance of the claims of the applicant, then the Court of Appeals must provide the applicant, counsel, and "a record of sufficient completeness to enable him to attempt to make a showing, that the District Court's certificate of lack of 'good faith' is in error" (pp. 921-2), and that leave to appeal as a pauper should be granted.

4. In the precise words of the Court:

> "If, with such aid, the applicant then presents any issue for the court's consideration not clearly frivolous, leave to proceed *in forma pauperis* must be allowed" (p. 922).

The State completely omits the fact that there are two requirements already expressed which are absent in the Indiana processes. The would-be appellant is permitted to bring with him "a record of sufficient completeness" to give him a chance to make a showing and he brings this record, with counsel, to the Court of Appeals. In Indiana, the record is not available for the indigent despite the fact that it is jurisdictional to the Supreme Court. In Indiana, the indigent is not in the Supreme Court and cannot have its judgment exercised on his case. The *Coppedge* case requires the presence of the indigent (legally) and his record in the Court of Appeals and requires that the discretion of that Court be applied to his claim and to his record.

The *Coppedge* case insists upon true equivalence for indigent and non-indigent; Indiana misses the mark.

(e) Indiana's Mysterious Review

Petitioner's brief contains, at page 21, a presentation concerning review of the Public Defender's decisions by the Supreme Court of Indiana. We are unable to determine what purpose the material is intended to serve, unless it is for justification of the claim in the last paragraph of that page to the effect that the Public Defender "works under the watchful eye of the Supreme Court, and in a very real sense, acts as an arm of the highest Court in Indiana."

The State surely does not intend to argue or even imply that Respondent has failed to exhaust all remedies offered to him by Indiana. *Brown* v. *State of Indiana* (1961), U. S. , 81 S. Ct. 1906, and *Brown* v. *State of Indiana* (1961), Ind. , 171 N. E. (2d) 825. To these citations we must add the admission by the State in these words, "Such review was not provided Respondent in this case" (P. Br. 21).

The particular kind of a review spoken of may have been foreshadowed by *Jackson* v. *Reeves* (1958), 238 Ind. 708, 153 N. E. (2d) 604, although this seems doubtful. The particular review referred to has been used twice. The first use occurred after remand from this Court in *McCrary* v. *State of Indiana* (1961), Ind. , 173 N. E. (2d) 300. The second use was made in an opinion dated October 24, 1961, exactly 90 days after the entry of the order by the District Court below granting Indiana a period of 90 days in which to provide the Respondent with the appeal that had been denied him. *Willoughby* v. *State of Indiana* (1961), Ind. . . . . , 177 N. E. (2d) 465.*

No one in Indiana knows how this form of review can be obtained, nor when it is available, nor upon what showing,

* But compare *Macon* v. *Orange Circuit Court* (1962), ... Ind. . . . . , 185 N. E. (2d) 619.

nor upon what terms (P. Br. 21). When granted, it is not a review which could be seriously offered as "an adequate substitute for the right of full appellate review."

Respondent will be content, at this point, with saying that the form of review discussed by the State appears designed to insure that the Public Defender will get "a fair trial" before the highest court of Indiana without offering to an indigent prisoner, already barred from that Court by the decision of the Public Defender, a hearing, even remotely equivalent to that which the non-indigent receives as a matter of right. This point will be more thoroughly covered under the next heading.

B. THE CASE FOR THE RESPONDENT.

1. What Indiana Denied Respondent.

Respondent was denied a full appellate review of the denial of his petition for Coram Nobis. Any non-indigent could have had such a review. The non-indigent could have had the judgment and discretion of the highest court in Indiana exercised with respect to his claims of error as supported by the transcript of his case. The indigent Respondent has had the benefit only of the exercise of the judgment and discretion of the Public Defender. However learned, wise or able the Public Defender, it can hardly be claimed that consideration by him is constitutionally an adequate substitute for a full appellate review.

We submit this on the strength of the four (4) cases already invoked so often in this brief.

Griffin v. *Illinois* (1956), 361 U. S. 12.
Eskridge v. *Washington State Board of Prison Terms and Paroles* (1958), 357 U. S. 214.
Burns v. *Ohio* (1959), 360 U. S. 252.
Smith v. *Bennett* (1961), 365 U. S. 708.

2. Indiana's Opportunities to Furnish Respondent With a Review.

The Respondent, having been refused the assistance of the Public Defender, sought the assistance of the trial court in his efforts to obtain counsel and his transcript. When this was denied, he sought the assistance of the Supreme Court of Indiana, using as a basis a Petition for a Writ of Mandate. This petition was denied (*Brown v. State of Indiana*, Ind. , 171 N. E. (2d) 825). He sought Certiorari in this Court. His petition was denied without prejudice to the application for a Writ of Habeas Corpus, which he made, and which has resulted in this cause (*Brown v. State of Indiana* (1961), U. S. , 81 S. Ct. 1906).

The review of which Indiana speaks in *McCrary v. State of Indiana* (1961), Ind. , 173 N. E. (2d) 300, and *Willoughby v. State of Indiana* (1961), Ind. , 177 N. E. (2d) 465, and in the brief of the State at page 21, was not granted to this Respondent.

After the Respondent's petition for a Writ of Habeas Corpus was filed in the United States District Court and as part of the order of that court, later affirmed by the Court of Appeals for the Seventh Circuit, and as a result of which the State filed the petition for Writ of Certiorari, resulting in this cause, the District Court granted the State of Indiana 90 days in which to give Respondent Brown a full appellate review of his Coram Nobis denial (R. 63). The State of Indiana took no action in response to the order of the District Court (R. 67). The State of Indiana has thus passed at least two full opportunities to furnish to Respondent Brown either a full appellate review or that which by the terms of *McCrary* and *Willoughby* and by the implication of the State's brief (page 21) is submitted as an adequate substitute for such full appellate review.

Indiana has not acted with respect to Respondent Brown. Indiana suggests in *McCrary* v. *State of Indiana* (1961), Ind. , 173 N. E. (2d) 300, and more forcibly in *Willoughby* v. *State of Indiana* (1961), Ind. , 177 N. E. (2d) 465, and implies in its brief (p. 21) that it now offers to indigent prisoners some kind of review which it believes to be the equivalent of the full appellate review that non-indigents receive as a matter of right.

Since Indiana has chosen not to afford Brown either the full appellate review or that substitute which it has granted to Willoughby and McCrary, how can the State be heard to complain now of the order of the Court below?

3. What the Respondent Would Have Had if the Review Said To Be Available in Indiana Had Been Granted to Him.

That which Indiana granted to McCrary and to Willoughby was withheld from Brown. Even if granted to Brown, the review granted to McCrary and Willoughby falls far short of fulfilling the requirements of the Fourteenth Amendment to the Constitution of the United States.

For purposes of the question raised in this cause, the *McCrary* case began in this Court. In *McCrary* v. *State of Indiana* (1960), 364 U. S. 277, 80 S. Ct. 1410, this Court vacated the order of the Indiana Supreme Court dismissing McCrary's appeal and remanded the cause to that Court using the following language:

> * * * Petitioner's attempted appeal to the Supreme Court of Indiana from a denial of relief in a post-conviction *coram nobis* proceeding was dismissed because of his failure to comply with rules of that court, requiring, *inter alia*, the filing of a transcript of the trial proceedings. He alleges that the dismissal denied him the equal protection of the laws because he was and is unable to pay for the preparation of such a

> transcript, see *Griffin* v. *People of State of Illinois*, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891, and that although he attempted to avail himself of the services of the Indiana Public Defender, who is empowered to secure the preparation of such a transcript in paupers' cases, see Burns' Indiana Stats. (1956 Repl.), § 13-1401 et seq., that officer declined to assist him."

When the Indiana Supreme Court again took up the case of McCrary, it did pass on the allegations of McCrary as a petitioner in accordance with the directions of this Court, interpreting these allegations in the light of the law of Indiana and in the light of its own understanding of the *Griffin* case. *McCrary* v. *State of Indiana* (1961), Ind. , 173 N. E. (2d) 300.

In that opinion the Indiana Supreme Court, unfortunately, began its consideration of the remanded case with what appears to be an acute misunderstanding of the basic significance of *Griffin*. For example, the Court says at page 302:

> "In this State both the right of appeal from the conviction in any criminal case and from a judgment in any post-conviction proceeding are available to all persons who are unable to pay the cost of their appeal upon the same terms and conditions."

Later in the opinion, the Court points out that McCrary's proceeding had been considered under the same Rules as applied to all indigents' cases arising in the State and that this disposed of any danger that McCrary might have been denied "his full rights of due process" (page 302). This argument seems to creep into the State's brief at page 15.

The Indiana Supreme Court indicates that all paupers have equal rights in Indiana and proceeds to describe what it has caused to be done in response to the mandate from this Court.

This is what the Court did and required to be done:

Ordered the Public Defender to show cause "why he declined if he did decline or refuse, to provide a transcript for appellant (McCrary) or to assist him in the preparation of an appeal * * *" (P. 302);

The Public Defender filed his verified answer and return stating that McCrary did request his services and that the Public Defender personally interviewed McCrary; that he made a complete and thorough investigation of the case; that he found the facts to be (and these he sets out at great length); that the Public Defender finds that McCrary's confession was freely and voluntarily made and that McCrary's counsel at the trial was also of that opinion; that he feels the only possible defense would have been that of insanity, which McCrary refused to allow counsel to interpose; that appellant testified in his own defense and that his testimony substantially follows the confession; that the Public Defender attaches McCrary's confession as Exhibit "A"; that the Public Defender attaches as Exhibit "B" an affidavit of appellant's trial counsel stating, *inter alia*, that a brother of McCrary's thanked trial counsel for what he had done; that the Prosecuting Attorney gave McCrary every possible right and that he had a fair and impartial trial; that the Public Defender after investigation could find no basis for any post-conviction proceedings and he so informed McCrary; that after McCrary had filed *pro se* a petition for error coram nobis, which was dismissed, the Public Defender made an investigation of McCrary's charges in that petition; that he found them to be without foundation and that he refused to affect an appeal from the dismissal of the petition for writ of error

coram nobis; that McCrary makes twelve charges, which are summarized (pp. 302-4).

After this summary of what was done, the Supreme Court of Indiana states, "The facts and circumstances as shown by the record now before us show each and all of these allegations to be wholly without merit, and we deem it unnecessary to cite authorities or express the reasons for our conclusion" (p. 304).

In its opinion the Indiana Supreme Court puts forth a series of distinctions—that this is a post-conviction appeal which the State may offer upon such terms as it deems wise; that Indiana appeals at public expense, as a matter of right, are limited to appeals from a judgment of conviction; that coram nobis is a post-conviction remedy, civil in nature, and McCrary may not as a matter of right have a transcript furnished him at public expense for a judgment denying his petition for this right (pp. 304-6). All of these distinctions, we submit, have been wiped out by *Smith* v. *Bennett* (1961), 365 U.S. 708, 81 St. Ct. 895. At this point in the opinion the Supreme Court of Indiana says: "Having failed to secure the aid and services of the Public Defender to prosecute his appeal, appellant then attempted *pro se* to perfect an appeal to this court" (p. 306). The Court continues, in substance, that when a prisoner seeks to represent himself in an appeal from a judgment in a post-conviction proceeding, he is bound by all of the rules of the Court. Rules 2-6 and 2-40 are set out in the opinion (p. 307) and the Court continues in the following words:

> "Appellant's paper filed herein entitled, 'Appeal of Amended Petition for Writ of Coram Nobis' is, in fact and in substance, a brief * * *. It contains neither a proper assignment of errors nor a certificate of the judge or the clerk of the court as to the authenticity or genuineness of such parts of the record as are purported to be copied and submitted as a part of such

papers. There is no bill of exceptions containing evidence, nor are there any certified copies of the record in the trial court from which questions attempted to be raised by the appellant could be determined, as required by Rule 2-40, *supra*.

"The rules of this Court have the force and effect of law: (citations omitted); they are applicable to and enforceable against *all* without regard to economic status, race or creed (citation omitted).

"Because of the failure of appellant to comply with provisions of Rule 2-6, *supra*, and Rule 2-40, *supra*, this court is without jurisdiction to determine the questions which he has attempted to raise.

"For the foregoing reasons the attempted appeal herein is dismissed" (p. 307).

Before we discuss the meaning and significance of *McCrary*, we wish to present an analysis of *Willoughby* v. *State of Indiana* (1961), ... Ind. ....., 177 N.E. (2d) 465. In *Willoughby* the Court is considering a petition for rehearing in an original action in which petitioner sought a Writ of Mandate compelling the trial court to furnish him with a transcript. The original petition had been denied. In much the same fashion as was true in *McCrary*, the Court gets a report from the Public Defender. The Court then denies the petition for Mandate, leaving *Willoughby* without his transcript. However, there is omitted from this decision the distinctions urged in *McCrary* and which *Smith* v. *Bennett* (1961), 365 U.S. 708, 81 S. Ct. 895, disallowed. The Court puts an exclamation point after the *McCrary* decision by saying at page 470:

"Under the facts here present (in the absence of any merit for appeal) the Public Defender had no authority to expend public funds for a transcript, therefore, he was justified in his refusal. In fact, when we consider the petition of the relator in the light of the reports filed by trial counsel and the Public Defender, we do not find any probable cause for appeal."

The Court specifically finds that no probable cause for appeal is shown to exist and concludes with the following language:

> "From common experience we know that a convicted defendant, who is financially able to do so, and therefore required by law to pay the costs of appeal, would not incur such costs against the advice of counsel who could find no error as cause for appeal unless, of course, such convicted defendant had personal knowledge of some specific error which he could *pro se* present to this court, contrary to the advice of counsel. By the same logic it is not reasonable to contend that equal protection under the law requires that the state must pay the cost of appeal for a poor person against the advice of counsel and in the absence of any showing of probable cause for appeal, merely because the convicted person is an indigent.
>
> Under our law which affords every accused person the right of asserting every available defense by competent counsel, with the opportunity (as in this case) of judicial review by this court over the action of such counsel, the state of Indiana has afforded to indigent defendants and non-indigent defendants alike, insofar as is reasonably possible, equal protection under the law in both the trial courts and on appeal" (p. 472).

Neither *McCrary* nor *Willoughby* answer the very simple objection to the Indiana process that the non-indigent prisoner may have his appeal regardless of the lack of merit, regardless of the frivolity. Neither of these cases answer the obvious objection that the non-indigent prisoner has an appeal based upon his record.

In these cases, McCrary and Willoughby become bystanders. In the last analysis, a reading of the *McCrary* case indicates that, under Indiana rules, he was not actually in court at any time, and, in both instances, the indigents, McCrary and Willoughby, were judged by some one else's record. This is exactly opposite to the right accorded every non-indigent.

If it were the practice of the Indiana Supreme Court to screen the appeals of non-indigents for lack of merit or frivolity, by this procedure it might well be that the indigent would be bound by the same rules.*

It would appear that the Supreme Court of Indiana is entrapped by the statutes with respect to the creation of the office of the Public Defender and by its own rules. The State is in a position in which it is impossible for it to grant equal protection to any indigent prisoner in the position of McCrary or Willoughby, or the Respondent Brown.

It should be noted that the Supreme Court of Indiana in the *McCrary* case actually says that McCrary is not before the court because he has come without a transcript. It does not matter how fair a trial the Public Defender receives nor how fair a trial the indigent's trial counsel receives, if the indigent prisoner himself is denied a full appellate review available to all non-indigents.

In *Willoughby* v. *State of Indiana* (1961) ..... Ind. ....., 177 N.E. (2d) 465, the Court cites a note in Vol. 36 of the Indiana Law Journal at page 237. While the note may leave much to be desired, it must be remembered that it was written shortly after *McCrary* was decided. It recognizes in the body of the note and in its conclusion the existence of a constitutional weakness in the Indiana Public Defender system and sets up warnings that Indiana may have to "ferret out and repeal or adjust existing laws which are not compatible" (p. 245) with the decisions of the Supreme Court of the United States. The article makes it clear that the *McCrary* decision (meaning the decision upon remand by this Court) may require the task to be faced immediately, and the article points to the weakness in the Indiana Public Defender system resulting from the decisions in

* *Coppedge* v. *United States* (1962) ..... U. S. ....., 82 S. Ct. 917, at 922-3.

Griffin v. *State of Illinois* (1956), 351 U.S. 12 and *Eskridge* v. *Washington State Board of Prison Terms and Paroles* (1958), 357 U.S. 214.

In the article, Indiana's leadership through its Public Defender system is referred to and the article adds at page 245, "Leadership or prominence, however, are subject to decadence in a stagnant climate". The position of the State of Indiana, in this case seems mainly an effort to shore up "the stagnant climate" of the appellate processes governing indigent prisoners in Indiana.

It is submitted that had this kind of "review" been made available to Brown, the requirements of the Fourteenth Amendment of the Constitution of the United States would not have been met.

CONCLUSION.

We have sought to find other ways of expressing the conclusion in order to avoid repeating the conclusion stated on behalf of the Respondent in the brief filed with the Court of Appeals for the Seventh Circuit. It has been determined to repeat that conclusion.

Frivolity is not indigenous to the indigent nor hope limited to the well-to-do. Our Constitution does not permit the frivolity and the hope of the financially able to march in through a door which opens to the Supreme Court of a State, unless that door is also open to the frivolity, if need be, and surely to the hope of the indigent.

Respondent respectfully submits that the decision of the Court below should be affirmed.

Respectfully submitted,

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